IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 198 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BADARSINH RAMSINH ZALA

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Petitioner

MR KAMAL MEHTA, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 02/03/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

Appellant-original accused ('accused' for short) in Sessions Case No.46/90 has filed this appeal against the judgment and order dated 11th March, 1991 whereby the learned Additional Sessions Judge, Sabarkantha at Himatnagar has held the accused guilty of offence punishable under section 302, 324 and 354 of Indian Penal

Code and has sentenced to rigorous imprisonment for life, rigorous imprisonment for one year and rigorous imprisonment for one year respectively and has also ordered that substantive sentences to run concurrently.

Facts leading prosecution of the accused are as under:

Accused, deceased Sardarsinh Virsinh, Jetusinh Kalusinh, PW 3, Lalsinh, PW 4, Chanpaksinh Sardarsinh, PW 6, Kailasbha, PW 5 are the ordinary residents of village Nava Kesarpura, Tal: Prantij, Dist: Sabarkantha. 11th March 1990 was "dhuleti" day. Kalubha, PW 5, wife of Lalsinh, PW 4 had come to the village being first dhuleti day after their marriage. All of them were playing Dhuleti on that day along with other young villagers. After the dhuleti play was over, PW 5 had gone to wash her cloth at a place near the house of the accused which is on the rear side of the house of Lalsinh, accused came and dragged her by hand towards his house. Kalubha, PW 5, complained of the same when her elder brother-in-law Jetusinh, PW 3 and uncle Sardarsinh, deceased, were present. Deceased Sardarsinh told them not to bother for the moment and that he would go and reprimand Badarsinh, accused. In the evening at about 5.00 p.m., Sardarsinh and Jetusinh, PW 3, went to the house of the accused to reprimand him. They had no weapon with them. They went to the house of Renusinh, elder brother of the accused as both the brothers were residing in front and rear portion of a house. Sardarsinh told Renusinh to reprimand his brother Badarsing as he has cut joke. At that time, Badarsinh came with 'dharia' abusing and told Sardarsinh that "Sala na-layak, who are you to reprimand". So saying, accused gave 'dharia' blow on the left side neck portion of Sardarsinh. Sardarsinh fell down and before Jetusinh, PW 3 tried to catch hold of accused, accused gave a 'dharia' blow on his right hand wrist and ran away towards the field with 'dharia'. By that time, Lalsinh, PW 4 who had come there was also given a 'dharia' blow by the accused. Neck of Sardarsinh was cut and he died on spot. PW 3 then went to call Vijesinh Kalusinh, Police patel of the village who came there at about 6 O'clock and the incident was narrated to him. Then PW 3 and Police Patel visited the scene of offence and came to Talod and filed complaint before the Police Sub-Inspector.

Police Sub-Inspector, Talod, on recording the complaint registered the offence, investigated into the matter and submitted charge-sheet in the Court of Judicial Magistrate, First Class, at Prantij who in his

turn committed the case against the accused to the Court of Sessions.

Learned Additional Sessions Judge on completion of the trial held the accused guilty of the offences and ordered sentence as referred to above. This judgment and order of conviction is assailed in this appeal.

Ms. Banna Datta, learned advocate appearing for the accused has challenged the conviction mainly on three grounds, namely, (1) that the prosecution has suppressed the genesis and therefore the oral evidence of the witnesses is not reliable inasmuch as the prosecution has failed to explain the injuries on the person of the accused; (2) that the learned Addl. Sessions Judge ought to have given benefit of doubt as the weapon by which the accused is alleged to have inflicted blow on Sardarsinh as a result of which he died does not bear the blood group of the deceased which is 'O' group. On the contrary, the weapon is found with blood group of 'A'. The prosecution has not explained to whom that 'A' group blood belonged and (3) that the learned Addl. Sessions Judge has erred in appreciating wrongly the self-defence advanced by the accused.

It is the case of the accused that deceased and Jetusinh had come with sticks and had assaulted him and caused injuries on the person. When he felt that his life is in danger, in order to defend, he has inflicted injury on the person of the deceased. According to the learned advocate for the accused, the accused has not exceeded his right of self-defence in the facts of the present case. Learned advocate Ms. Datta for the appellant-accused contended that the learned Addl. Sessions Judge has erred in not only not accepting this defence but has also erred in appreciating the evidence of the prosecution witnesses. The appeal therefore should be allowed.

Learned APP, Mr Kamal Mehta, contended that the judgment and order of the learned Addl. Sessions Judge does not call for any interference. Mr Mehta contended that the injuries on the person of the accused are such which need not be explained by the prosecution. Mr Mehta also contended that such injuries are not caused by the prosecution witnesses in view of the opinion of the doctor that such an injury can be caused while in quarrel to snatch the weapon. Mr Mehta further contended that simply because the weapon recovered at the instance of the accused is found with 'A' group blood stains which does not belong to the deceased that does not by itself

rule out the probability of use of that weapon by the accused. Mr Mehta also contended that in the facts and circumstances of the case, the learned Addl. Sessions Judge has rightly held that the accused has exceeded the right of self-defence and therefore not entitled to the benefit of self-defence. He, therefore, contended that the appeal be dismissed.

In the afternoon of 11th March, 1990, being a 'dhuleti' day, villagers of village Nava Kesarpura were playing 'dhuleti'. After that play was over, PW 5 went to wash her coloured clothes on the backside of her house near the house of the accused. Accused caught hold of her hand and tried to drag her towards his house. This was complained of by PW 5 to PW 3 and the deceased. Then deceased had gone in company of PW 3 to reprimand the accused. According to the prosecution, deceased complained about the incident to the elder brother of the accused and accused has rushed out from his house and abused and inflicted a blow of dharia on the neck of Sardarsinh who died instantly. When PW 3 tried to catch hold of accused, he was also injured and while running away when he met Lalsinh, PW 4, he was also inflicted blow.

Deceased was taken to Civil Hospital, Prantij where doctor, PW 2, performed post-mortem examination who has found the following external injuries:

"Incise wound over the left side of neck extending from notch of sternum obliquely upwards towards back of neck size of wound 18 cms x 2 cms visceral deep."

So far as internal injuries are concerned, it is found that left common carotid A. is cut. It is also found that trachea and oesophagus were also cut. Cause of death is hypovollernic shock due to injury to left common carotid A. and injury to Trachea. The doctor has stated that these injuries were sufficient in the ordinary course of nature to cause death. Doctor has also stated that the said injury can be caused by weapon like dharia. Doctor has denied that such an injury can be caused by fall at an edged weapon. Thus from the evidence of doctor, PW 2, it is clear that the deceased has died a homicidal death due to injury which could be caused by muddamal dharia and such an injury cannot be caused by fall on an edged weapon.

In the evening of 11th March, 1990 at about 7.00 p.m. Dr.Atul Kumar, PW 8, has admitted the accused. He

had gone to doctor in company of his brother Ranjitsinh who told him that there was scuffle and the injury was caused on the right shoulder and temple region and that he took stitches and gave injection. However, the injury on the temple region was minor one. On the next day evening Police came and arrested Badarsinh, i.e. accused. Ranjitsinh also had an injury on the right eye-lid and he had also treated him. In the examination-in-chief he has admitted that the injury on the shoulder can be self-inflicted and the injury on the temple region was of an ordinary and simple nature. Injury on the shoulder can also be caused by striking with a vessel having an edge. The doctor has, in the cross-examination admitted that the injury on the shoulder can also be caused by a blow of dharia and that part of the body can be said to be a delicate one. He has, however, not inquired as to how the injury is caused. Relevant case papers are also produced at Ex.26. Thus there are two injuries on the person of the accused and they were injury on the right shoulder and temporal part. The accused was taken to the doctor by one Ranjitsinh, his brother, who had also an injury. Accused has not disclosed before the doctor as to how he was injured. Brother of the accused Ranjitsinh was also injured and he has not been examined by the defence. It is only they who can say how they both got injuries on their person. When it is not disclosed before the doctor as to how the injuries were caused, and when they themselves have not disclosed before the doctor as to how the injuries were caused, it is now required to be determined whether the injuries on their person were caused at the time of incident or not. The doctor has stated that the injury on the shoulder could be caused if one strikes with a vessel and the injury on the temporal region could be caused if one strikes with a tree. When the accused has not disclosed as to how he got injuries before the doctor, the probability of injuries being caused not at the time of incident can be accepted.

The Supreme Court in the case of Hare Krishna Singh v. State of Bihar (AIR 1988 SC 863) held that the burden of proving the guilt of the accused is undoubtedly on the prosecution. The accused is not bound to say anything in defence. The prosecution has to prove the guilt of the accused beyond all reasonable doubts. If the witnesses examined on behalf of the prosecution are believed by the court in proof of the guilt of the accused beyond reasonable doubt, the question of obligation of the prosecution to explain the injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence

has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused. It is further held that it is not an invariable rule that whenever the accused sustains an injury in the same occurrence, the prosecution has to explain the injuries failure of which will mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence. It is further held that in the facts and circumstances of the case, the prosecution is not obliged to account for the injury and that the failure of the prosecution to give a reasonable explanation of the injury would not go against or throw any doubt on the prosecution case. Keeping this in mind, it will be relevant to refer to the evidence of PW 3 who had accompanied the deceased Sardarsinh to the house of the accused. PW 3 has said that he went to the house of the accused in company of Sardarsinh to reprimand the accused for his conduct. It is specifically stated that they had gone to the house of the accused without any arm. He has denied that he had gone there with dharia and Sardarsinh had a stick and by the said dharia and stick the accused was injured. From the scene of offence, neither the stick nor dharia was found. If Sardarsinh had a dharia or a stick with him, then that stick or dharia must be found lying in the house of Renusinh as he had fallen in the house immediately on receipt of blow on his neck. After causing injury, accused has left the house and then he first met Lalsinh, PW 4. Lalsinh, PW 4 was also injured by dharia by the accused. He has seen Jetusinh who had no weapon with him and he did not find Sardarsinh with any weapon lying in the house of Renusinh. Lalsinh, PW 4, has seen the accused causing injury by dharia on the wrist of Jetusinh PW 3. When the accused was running away, he was seen with dharia by Champaksinh, PW 6, who later on came to know that Badarsinh inflicted blow on his father. Thus, from the evidence of PW 3, it is clear that they had gone to the house of the accused without any arm and the injury on the person of the accused would have been probably by strike with some vessel so far as the shoulder is concerned and by strike with tree when he was trying to run away so far as the injury on the temporal region is concerned. That probability made out by the prosecution, in our opinion, explains the injury on the person of the accused. That apart, in view of the judgment of the Supreme Court in the case of Hare Krishna Singh (supra), when the ocular evidence is cogent and convincing, non-explanation of injury on the person of accused does not adversely affect the case of the

prosecution. This apart, it is difficult to believe that the injury on the person of accused is caused at the time of incident as the same is not disclosed before his own doctor before whom he went for treatment in company of his brother. Admittedly, at the time of incident, Ranjitsinh was not present. Ranjitsinh accompanied the accused to Dr.Atulkumar, PW 8, who has treated the accused and his brother Ranjitsinh. Ranjitsinh was not present at the time of incident and Ranjitsinh was injured and both, the accused and Ranjitsinh had gone to the doctor suggests and calls upon us to infer that the injury on the person of the accused might not have been caused at the time of incident but might have been caused subsequently. Injury on the person of the accused was not caused at the time of incident is proved from the evidence of Jetusinh, PW 3. The accused was arrested on the next day in the evening at about 6.00 p.m. He had got himself admitted in the Nursing Home of Dr. Atul. According to Dr.Atul, PW 8, after getting the accused admitted in his Nursing Home, Ranjitsinh left the hospital next day morning at about 9.00 a.m. saying that he wants to inform the Police Station, Prantij. Case papers were produced at Ex.26. First page of said case papers refer to the case papers of Ranjitsinh and the second page onwards refers to the case of Badarsinh. No history is referred to in the case papers. This, in our opinion, is suggestive that the injury on the person of the accused cannot be co-related with the incident.

Ms Datta appearing for the accused relying on a judgment of the Supreme Court in the case of Rukma v. Jala [1998 SCC (Cri) 213] contended that failure to explain the injuries on the accused makes the evidence of the prosecution, at least eye witnesses, doubtful one and no reliance can be placed on such eye witnesses. She has relied on the following observations :

"The fact that as many as six accused had received injuries during the incident cannot be disputed in view of the medical evidence on record. All the injuries received by Jala (A-1) and Vishnu (A-2) were not minor. Vishnu (A-2) had received an incised injury on his hand and Jala (A-1) had received a lacerated wound on his head. They were bleeding injuries. All the injured eyewitnesses who were with deceased Anna have denied to have caused any injury to any of the accused. They flatly denied that they had weapons with them at the time of the incident. If under these circumstances the High Court thought it fit not to place any reliance on Sua,

Mohan, Punna, Arjun and Rukma, it cannot be said that the High Court was not justified in doing so.

The accused was also examined by Dr.Deepakbhai Rathod, PW 1 at 9.50 p.m. on 12th March, 1990 i.e. the next day of the incident. There, he has given history that the injury was caused by dharia at 5.00 to 5.30 p.m. on 11th March, 1990. Doctor, PW 1, has deposed to the effect that the injury on the person of the accused could be caused by some edged weapon. Such an injury could be caused in a struggle to snatch weapon like dharia. He has also admitted that such an injury can also be caused by a forcible blow by an edged weapon. For the first time, the accused has disclosed before the doctor at 9.50 p.m. on the next day that he was injured at 5.00 p.m. to 5.30 p.m. on 11th March, 1990 by dharia. When he had an opportunity to disclose as to how he was injured before his own doctor, PW 8, he has not disclosed the same. Thus, injury on the person of the accused might not have been caused in the course of incident and the possibility of such injury being caused in a struggle to snatch away the weapon cannot be ruled out as it is the case of PW 3 that after the accused injured Sardarsinh, he tried to catch hold of him and he was injured. From the evidence of PW 4, the say of Jetusinh is corroborated that Jetusinh had tried to catch hold of the accused. Thus the injury on the person of the accused, in our opinion, stands indirectly explained by the prosecution that the same can be caused in struggle to snatch away the weapon. If it is not specifically explained, then also it does not damage the case of the prosecution. Therefore, we do not find any substance in the contention that the prosecution witnesses cannot be relied upon as they are suppressing the genesis as they have not explained the injury on the person of the accused.

This brings us the second contention that the weapon found at the instance of the accused is not the weapon used by the used as it does not contain the blood group of the deceased. It is true that the weapon found at the instance of the accused was stained with blood and was found to have 'A' group blood. Blood group of the deceased is 'O'. It is not known what is the blood group of the accused. However, the blood found from the pant of the accused and the weapon shown and seized at the instance of the deceased is found with human blood of 'A' group. In our opinion, the accused has not explained in his further statement as to how his pant was found stained with blood. Accused was injured on the shoulder and that injury could be caused as per the say of the

Doctor in a scuffle to snatch away the weapon and that is how the pant and dharia might have been stained with blood. The change in blood group, in our opinion, is suggestive that the injury on the person of the accused is caused even if by dharia later in time than the injury caused on the person of the deceased. When a blow with dharia is given, there is sufficient distance between the victim and the assailant. Therefore, there are all probabilities that the cloth of the accused might not have stained with blood of the victim. Yet in the instant case, pant of the accused is stained with human blood. Therefore the probability of his own blood stains cannot be ruled out.

Another aspect of the matter is that the dharia weapon is found at the instance of the accused on the third day morning from the field under the heap of castor-seed. This finding of dharia is at the instance of the accused. But that does not necessarily lead to an inference that it is with this dharia the deceased was injured. According to the substantive evidence of PW 11, it is the accused who showed the willingness to show the dharia and he went in company of police personnel to the field and found out dharia from under the heap of castor-seeds. If dharia would have the blood group of the deceased, it would be a circumstance against the accused. But in the instant case, dharia was stained with human blood but the blood group is different. Therefore, the probability that the accused might have misguided the police cannot be ruled out. Simply because the dharia is found at the instance of the accused and it does not bear the blood group of the deceased by itself is not a circumstance adverse to the prosecution. Thus, in our opinion, dharia found at the instance of the accused with human blood is a circumstance against the accused, but is not a conclusive evidence of that dharia being used as alleged by the prosecution. However, it does not adversely affect the case of the prosecution. Therefore, we do not find any substance in this contention of the learned advocate for the accused.

This brings us to the last contention about the self-defence. According to the accused, the blow inflicted by him was in self-defence inasmuch as the deceased and PW 3 had come with stick and dharia respectively at his house and when they inflicted blow of dharia which fell on his shoulder and when the deceased gave a blow with stick which fell on his forehead, to defend himself, he has given a dharia blow. One thing is very clear in the instant case that in his statement under section 313, he has not come out with the case that

he inflicted dharia blow on the deceased. He has simply stated that he was injured by dharia blow by Jetusinh. He has given complaint against Sardarsinh and Jetusinh at about 9.00 on 13th March, 1990. In our opinion, that complaint cannot be looked into in this case. However, the accused has not given the history of his injuries before the doctor, PW 8, who treated in the evening of the incident. From the evidence of PW 3 and 4 it is established that PW 3 and deceased Sardarsinh had gone, no doubt, to the house of the brother of the accused and they had no arms with them. The question is how and if so to what extent the right of private defence arises in the instant case. Under section 96 of the Penal Code nothing is an offence which is done in exercise of right of private defence. Second part of section 99 of the Penal Code provides for extent to which the right may be exercised. Right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 97 of the Penal Code contemplates that every person has a right, subject to the restrictions contained in section 99 to defend first his own body, and the body of any other person, against any offence affecting the human body.

Keeping these provisions of self-defence in mind, it is necessary to decide whether the accused had a right of self-defence and if so, the act committed by him is done in exercise of the right of private defence and if so whether has he exceeded his right of private defence.

From the evidence of PW 3, it is clear that PW 3 and deceased Sardarsinh had gone to the house of the brother of the accused, but without weapon. PW 3 has stated that the accused gave blow on the left side of the neck of Sardarsinh and when he went to catch hold of the accused, he gave a blow of dharia on his right hand wrist and he ran towards the field. By that time, Lalsinh PW 4 had come who was also given a dharia blow on his head by the accused. They chased him, however he ran away. Then they filed a complaint Ex.14. This part of evidence is corroborated by the evidence of PW 4. So far as the running away of accused with dharia is concerned, it is further corroborated by the evidence of Champaksinh, PW 6. PW 3 and PW 4 are injured witnesses. Their injuries are proved by the evidence of PW 1 who has issued certificates being Ex.9 and 8 respectively. Say of the injured witnesses PW 3 and 4 is also corroborated by complaint Ex.14 given by PW 3. An attempt was made in the cross-examination of Champaksinh, PW 6, to show that the deceased and PW 3 had stick and dharia respectively. However, that fact is denied by the said witness. Thus

injury on the person of PW 3 on the right hand wrist and PW 4 on parietal region are proved. An attempt was made in the cross-examination of these witnesses to show that there was a quarrel with the owner of the goat by deceased. It was pertaining to the value of goat. We are not able to understand as to how there is any relevance of the quarrel as to the price of the goat. However that fact is denied. Discovery of dharia can be an additional circumstance to corroborate the say of PW 3 and 4. However, as discussed earlier, we do not propose to rely on that circumstance for additional corroboration to their evidence. When it is proved that the deceased and PW 3 were not armed with any weapon and when they were in the house of the brother of the accused, what made accused to believe that he was required to defend his own body against any offence affecting the human body. It will be relevant to refer to the evidence of PW 3 that when PW 5 complained against the accused of having misbehaved, the deceased had not lost his temper. He had not lost his patience. What transpires from the evidence of PW 3 is that he on the contrary said that other people do not bother and that he would go and reprimand Badarsinh. This conduct of deceased suggests that the deceased was a man with patience and understanding. He must be knowing the consequence and implications of a quarrel on such a ground. He therefore without losing temper had gone to the house of brother of the accused which comes first and told the elder brother of the accused about the incident. Before anything further happens, the accused came and gave a dharia blow on the neck of the deceased. It is not suggested in the cross-examination of any of the prosecution witnesses more particularly PW 3 being eye witness and present and injured at the time of incident to show that any of the act or behaviour of the deceased made the accused to apprehend the injury on his person which may cause his death or grievous hurt or there was an attempt even to cause an act which may cause death or grievous hurt. Thus in absence of any material on record to show that there was any apprehension to death or grievous hurt to the accused, the question of right to defend does not arise and has not arisen in the instant case. When the right of private defence of the body has not arisen, there is no question of the said right of the accused to exceed to the extent of causing death of the other party. It is clear from the evidence of PW 3 and 4 who came little late that nothing has happened which could have made or created an apprehension of the accused that he is required to defend himself.

PW 3 and deceased had gone to the house of the

brother of the accused. Accused was residing on the rear part of the house. Deceased told the brother of the accused about the behaviour of the accused. Deceased was aged about 50 years while the accused is aged about 24 years. The deceased told about the behaviour of the accused to his elder brother. Before the elder brother responds, it appears from the evidence that the accused came out with Dharia and gave a blow. If anything would have occurred between the deceased, PW 3 and the accused, elder brother of the accused was present when the incident took place. There was no difficulty with the defence to examine that brother as a defence witness when they have now come out with the defence as alleged in their complaint which we have not read in this evidence. Under the circumstances, the prosecution has proved the case against the accused and the defence has failed to bring their case within the exception of self-defence.

No other contentions are raised.

In the result, the appeal fails and is dismissed.

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(vjn)